FILED
APR 10 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1247

SYLVESTER K. STEVENS,

Petitioner,

—against—

HELEN C. FRICK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Sylvester K. Stevens, respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review the judgment of that Court dated February 1, 1967 (Appendix A hereto) which affirmed the judgment and order of the United States District Court for the Southern District of New York in favor of respondent, Helen C. Frick, dismissing petitioner's complaint and denying his motion for a preliminary injunction.

The Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at — F.2d — and reprinted as Appendix B hereto.

The opinion of the District Court is reported at 259 F. Supp. 654. The judgment, order and opinion of the

District Court are reprinted at pages 4a-12a of the petitioner's Appendix in the Court of Appeals, nine copies of which are submitted herewith pursuant to Rule 21(4) of this Court.*

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 1, 1967. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

This case presents critical questions concerning the substantive and procedural breadth of the First Amendment right of freedom of the press. It brings before this Court important issues of widespread significance in the area of the free exercise of First Amendment rights.

For example, in *Dombrowski* v. *Pfister*, 380 U.S. 479, 484 n. 2 (1965) this Court left open for future resolution the conflict among the Courts of Appeals as to whether injunctive relief against unwarranted intrusions upon First Amendment rights through state judicial proceedings could be granted by the federal courts under the Civil Rights Act of 1871 (42 U.S.C. § 1983) as an exception to the anti-injunction statute (28 U.S.C. § 2283). That issue is ripe for determination in this case.

A related issue—also here presented—is whether the participation of the state through its judicial officers in the challenged invasion of First Amendment rights constitutes "state action" under the Civil Rights statute.

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* All record references in the form of page numbers followed by "a" are to the Court of Appeals Appendix; those references in the form of page numbers followed by "b" are to the Court of Appeals Supplemental Appendix. Those references preceded by the letter "R" are to the certified record on appeal.

Further, the present case brings with it for decision the issue of whether the anti-injunction rule of 2283 must yield to the imperative recognition of constitutional rights of paramount importance such as those granted by the First Amendment when the state proceedings are of themselves the instruments of invasion. The decisions of the Supreme Court and of the Court of Appeals for the Fourth Circuit appear to require 2283 to yield so that the Constitution may have the right of way. Yet, the Second Circuit panel which heard this case rejected such a principle. Significantly, in *Wolff* v. *Selective Service Local Board No. 16,* No. 30783, 2d Cir., January 30, 1967, a different panel of the same Court of Appeals for the Second Circuit rendered a decision which points to the opposite result.

At issue here are the power and duty of the federal courts to halt a clear, present and highly injurious invasion of the First Amendment right of freedom of the press mounted and propelled by means of a state court litigation, inaugurated and sustained by respondent, Helen Clay Frick, with the cooperation of the authorities, executive and judicial, of the Commonwealth of Pennsylvania. By that action, petitioner is threatened with an order either prohibiting distribution of his scholarly historical work altogether or forcing him to recant certain statements. These are the sole objects of the state suit. This relief is sought solely on the ground that three brief passages in petitioner's book, *Pennsylvania: Birthplace of a Nation,* are defamatory of plaintiff's father, Henry Clay Frick. Mr. Frick died in 1919. Thus far, the federal courts have refused to call a halt to the state inquisition. Meantime, the action has been used as a menace to obstruct distribution of the book.

The questions presented and upon which a writ of certiorari is requested are:

1. Does the First Amendment permit the issuance of

an injunction forbidding distribution of a scholarly work of history, or requiring its author to recant statements made in the book on the ground that the book is derogatory of plaintiff's famous father who died fifty years ago, the plaintiff herself not even being mentioned in the text?

2. Does the First Amendment tolerate the pendency of an action seeking only such relief?

3. Do the federal courts, under their general jurisdiction in cases involving constitutional questions (28 U.S.C. § 1331 [a]) and in cases brought "to redress the deprivation, under color of state law . . . of any right . . . secured by the Constitution of the United States" (28 U.S.C. § 1343 [3]) have jurisdiction of an action brought to enjoin further prosecution of a protracted state court proceeding in which First Amendment rights are in jeopardy and the very pendency of which is a restraint upon or destruction of those rights?

4. The petitioner having been haled by a state official—to wit, a sheriff—before a judicial officer of the state, holding court in state facilities, and compelled to answer a suit, the mere pendency of which is a burden on the exercise of First Amendment rights, has he been subjected to forbidden action taken "under color of any statute, ordinance, regulation, custom, or usage of any State. . . ." so as to allow him to invoke federal jurisdiction under the Civil Rights Act of 1871 (42 U.S.C. § 1983) and 28 U.S.C. § 1343 (4)?

5. Does 28 U.S.C. § 2283 forbid the issuance of an injunction against further prosecution of a pending state court action where important constitutional rights are suffering serious and irreparable invasion because of the mere pendency of that action?

6. Does the Civil Rights Act of 1871 authorize such injunctive relief and is an action brought pursuant to that statute an "expressly authorized" exception to § 2283?

7. Is it an abuse of discretion for a federal court to refuse to enjoin a protracted state proceeding seeking relief which the Constitution forbids, the mere pendency of which is an interference with and burden upon the freedom of the press, simply because of the speculative hope that the state court or this Court may ultimately and at some indeterminate future time grant petitioner the dismissal to which he is constitutionally entitled?

Constitutional and Statutory Provisions Involved

United States Constitution, First Amendment

> "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

United States Constitution, Fourteenth Amendment

> ". . . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

28 U.S.C. § 1331(a)

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest or costs, and arises under the Constitution, laws or treaties of the United States."

28 U.S.C. § 1343(3)(4)

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * *
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by

the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. § 1983 (Civil Rights Act of 1871)

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 2283

"A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Statement of the Case

Preliminary Statement

This case presents the critical issue whether the federal judiciary is compelled to sit idly by while sensitive First Amendment rights are put in jeopardy and their exercise immediately obstructed by a state court, or can take judicial action to protect those who are deprived of their right to freedom of the press.

The very necessary action that petitioner sought from the federal courts in this case was to enjoin the combined action of the defendant and the State of Pennsylvania, the object of which is to suppress a serious work of historical scholarship, by means of a judicial proceeding, the very pendency of which is, and is used as, a deterrent to the exercise of the First Amendment rights associated with freedom of the press.

The executive branch of the State of Pennsylvania haled Dr. Stevens before its judiciary in Cumberland County. He was ordered to attend before a judge of the state court of Pennsylvania which subjected him to questioning and now threatens to suppress his book, *Pennsylvania: Birthplace of a Nation.**

All this the State of Pennsylvania has done in response to a suit in equity commenced by Miss Frick in which the sole relief requested is the suppression of the book, because, according to Miss Frick, it is derogatory of her deceased father. Miss Frick has stated that, as an alternative, she will accept an order directing Dr. Stevens to recant by signing a list of *errata.*

The menace inherent in the pendency of the Pennsylvania suit is the cloud which it places over distribution of Dr. Stevens' book. Miss Frick's agents have used the pending state proceeding as a basis for threatening those who desired to distribute the book.

In *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), this Court declared:

> ". . . we have, in effect, avoided making vindication of the freedom of expression await the outcome of protracted litigation. Moreover, we have not thought

* Nine copies of Dr. Stevens' book (R 1 through R 400) are submitted herewith.

> that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." (380 U.S. at 487).

Accord, *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 87 S. Ct. 708 (1967).

The District Court and the Second Circuit failed to apply this transcendent constitutional principle. They not only denied Dr. Stevens' motion for an injunction *pendente lite* to restrain further prosecution of the Pennsylvania action but also dismissed his federal action.

Dr. Stevens here asks that this Court grant review of the judgment below, reverse and direct the entry of the injunction prayed for. Vigilant protection of First Amendment rights so requires.

The Facts

The salient operative facts are relatively simple, generally undisputed, and are as follows:

In December 1964, three years of work (and a lifetime of study) by petitioner, Dr. Sylvester K. Stevens (a well known and respected historian) (30a), culminated in the publication, through Random House, of a 400-page one-volume general history of Pennsylvania entitled, *Pennsylvania: Birthplace of a Nation* (30a-31a). This book was well received by reviewers (30a, 42a-55a), was the subject of a congratulatory resolution by the Pennsylvania Senate (30a-31a, 56a-57a) and won an Award of Merit bestowed by the American Association for State & Local History (30a).

Seven hundred persons—some living, but most now dead—are mentioned in the course of this book. Among

them is the Pittsburgh industrialist Henry Clay Frick, who died in 1919. He was the father of respondent, Helen Clay Frick. He is mentioned seven times (31a).

Miss Frick apparently received a copy of the book as a 1964 Christmas gift. She read the passages concerning her father and three of them were not to her liking (31a).

After complaining to Dr. Stevens, Miss Frick commenced a suit in equity, in the Court of Common Pleas of Cumberland County, Pennsylvania (31a-32a). A deputy sheriff of Cumberland County summoned Dr. Stevens into court (32a).

The complaint in the Pennsylvania suit is in equity. It seeks no money damages. Instead, the complaint demands an injunction against the sale and distribution of the book (15a-20a). As an alternative, Miss Frick has stated, she is willing to have the Pennsylvania court direct Dr. Stevens to sign a list of *errata* (74a-75a). Thus, Miss Frick seeks state suppression, or in the alternative, state censorship of Dr. Stevens' book.

No claim is made that the book contains any defamatory matter concerning Miss Frick (15a-20a, 33a). She is not even mentioned in the book (33a). (She does claim that anything uncomplimentary written of her father reflects adversely on her) (33a). Her basic allegation is that her father, who has been dead for almost fifty years, is defamed.

The three passages which Miss Frick asserts are untrue and defamatory of her father are:

1. "The Rev. George Hodges arrived in Pittsburgh in 1881 to become pastor of the Calvary Ascension Church attended by Henry Clay Frick and more Pittsburgh tycoons than any other single Pittsburgh

church. Unshaken by this array of wealth in his church, not all of which had been amassed in exact accord with what many regarded as Christian principles and practices, Mr. Hodges preached and acted as an apostle of social reform." (17a).

2. "In the bituminous fields of western Pennsylvania Henry Clay Frick had built a similar monopoly of coal and coke production and was equally successful in beating down efforts at unionization. Frick also made extensive use of immigrant labor and cut wages to an average of about $1.60 a day while extracting the longest hours of work physically possible. Most mines of the time were without anything resembling modern safety appliances or practices and serious accidents were common.

   "Still another abuse was the company town with its company store. The coal companies owned the houses, shoddy wooden shacks without sanitary facilities, which they rented at a high price to workers." (18a).

3. "The power of the union was broken in the bloody and disastrous Homestead strike in 1892 by stern, brusque, autocratic Henry Clay Frick." (18a).

Significantly, the judgments of Dr. Stevens about Henry Clay Frick are far milder than those of many other noted and respected historians (1b-5b).

Dr. Stevens moved in the Pennsylvania action to dismiss the suit on the ground that it violated constitutional rights of free press as guaranteed by the First and Fourteenth Amendments (34a, 63a).

The Pennsylvania court refused to grant the motion and then proceeded to a consideration of the action on the merits (34a, 63a).

Dr. Stevens' defense was based on a demonstration of the accuracy of what he had written (35a). To prove the relevant facts Dr. Stevens' counsel attempted to introduce three categories of evidence: (a) the oral testimony of historians as to their research about Henry Clay Frick, (b) secondary sources—respected historical writings on the subjects in issue and (c) contemporaneous newspaper accounts and other materials in the nature of so-called primary source materials (35a).

The Pennsylvania court took a most restrictive view of what was admissible to prove the propriety of what Dr. Stevens had written concerning Henry Clay Frick (35a-38a). Basically, the trial judge limited proof to eye-witnesses and "disinterested" primary sources (64a-70a). Thus, the court refused to consider much material of the kind historians generally use in their work. In so doing the trial judge made value judgments which only trained professional historians—not lawyers—can make intelligently and which judges are not authorized to make.

If, in order to avoid litigation of the kind commenced by Miss Frick, historians had to explore the past with only the tools afforded by the trial judge's rulings, history as we know it would cease to be written.

Miss Frick's use of the pending Pennsylvania action to aid her attempts to suppress Dr. Stevens' historical writing is documented by an event which took place in August 1965. At that time Mr. Buerger, Miss Frick's attorney, wrote a letter in her behalf to the Historical Foundation of Pennsylvania in which he advised of the pendency of the Pennsylvania suit, referred to the Foundation's tax-exempt status and threatened direct action against that tax status and to sue the Foundation for libel if it went ahead with plans to distribute 2,000 copies of Dr. Stevens' book to school and community libraries in Pennsylvania (34a, 61a-62a).

The Foundation did not go through with its plans, for the asserted reason that it could not afford to do so. How many foundations could afford to face so formidable a threat!*

In July 1966 Dr. Stevens sought the aid of the federal courts in order to put an end to Miss Frick's excursion in censorship and commenced the present action in order to achieve the result which the First Amendment mandates and which the state tribunal should have granted without ceremony—a prompt termination of the state litigation. Thus far, however, the federal courts have yielded in favor of further protracted proceedings in Pennsylvania where Miss Frick's suit remains *sub judice* before the court of Common Pleas; they have allowed "vindication of the freedom of expression [to] await the outcome of protracted litigation." *Dombrowski* v. *Pfister, supra,* at 487.

So grave a threat is, in the opinion of historians, posed by the Pennsylvania action to their freedom to write history that the American Historical Association and the Organization of American Historians have, in response, created a Joint Committee for the Defense of Rights of Historians Under the First Amendment. This Committee was organized to oppose censorship activities such as those initiated by Miss Frick (83a-84a). It has assisted in the prosecution of this federal action.

Dr. Stevens' assertion of jurisdiction in the courts below was founded upon at least two grounds: the presence of a constitutional question (with over $10,000 in controversy) (28 U.S.C. § 1331[a]) and a claim of deprivation of rights

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* See *Frick* v. *Boyd,* 214 N.E.2d 460 (Sup. Jud. Ct. Mass. 1966) for a similar, but there unsuccessful, excursion by Miss Frick against an 87-year-old social worker.

"under color of law" cognizable under the Civil Rights Act of 1871 (42 U.S.C. § 1981 *et seq.*, especially § 1983) and 28 U.S.C. § 1343 (3) and (4) (the enabling statute to the Civil Rights Act).

Reasons for Granting the Writ of Certiorari

There ought to be little doubt that Miss Frick can never be granted the final relief she seeks in the state action.

Injunctions against the written word, based on a claim that what was written was defamatory, were unknown at common law and are completely barred by the First Amendment, which is applicable to the states through the Fourteenth Amendment. See *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233 (1936); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Crosby* v. *Bradstreet Co.*, 312 F.2d 483 (2d Cir.), *cert. denied*, 373 U.S. 911 (1963); *Willis* v. *O'Connell*, 231 Fed. 1004 (S.D. Ala. 1916); *Kuhn* v. *Warner Bros. Pictures*, 29 F. Supp. 800 (S.D.N.Y. 1939); *Brandreth* v. *Lance*, 8 Paige 24 (N.Y. Ch. 1839); *League for Peace, Inc.* v. *Newspaper P.M., Inc.*, 188 Misc. 317, 65 N.Y.S.2d 480 (Sup. Ct. 1946). Nor can Miss Frick force Dr. Stevens to recant by signing a list of *errata* retracting the statements which Miss Frick finds displeasing to her.*

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* Further, Miss Frick's Pennsylvania litigation raises several additional problems of serious constitutional dimensions:

First, a serious problem arises under the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) inasmuch as Henry Clay Frick was—and is in history—a prominent figure.

Second, Miss Frick grounds her claim not on a libel of herself but on a claim that Dr. Stevens defamed her dead ancestor. Such suits were unknown at common law and we seriously doubt that the Constitution will tolerate more than the common law of libel. See, *Bridges* v. *California*, 314 U.S. 252 (1941).

Thus, the central questions raised in this litigation and here presented to this Court are whether the federal courts, with their vaunted solicitude for our cherished First Amendment rights, will intervene and halt the costly charade; or whether Dr. Stevens will be compelled to suffer through the agonies and expenses of protracted Pennsylvania trial court proceedings and state appeals, bear the risk of an adverse decision in the state courts and fine and imprisonment for contempt, in the meantime have his book suffer under the cloud of the pending litigation, before the author is finally relegated to seek relief from this Court several years hence.

There can be no doubt of the paramount place of the First Amendment rights of free speech and free press in the catalogue of constitutional values. A long line of decisions has established this principle beyond challenge. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Time, Inc.* v. *Hill*, 35 U.S.L. WEEK 4108 (January 9, 1967).

These rights are guarded with "a jealous eye." *AFL* v. *Swing*, 312 U.S. 321 (1941).

This Court has time and again declared that not only a direct interference with First Amendment rights, but any activity which inhibits their free exercise or which has a "chilling effect" transgresses the bounds of the Constitution. *NAACP* v. *Button*, 371 U.S. 415 (1963); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Mills* v. *Alabama*, 384 U.S. 214, 221-22 (1966) (concurring opinion); *Ashton* v. *Kentucky*, 384 U.S. 195 (1966).

This Court has mandated that any activities which have that forbidden effect must be halted promptly and summarily. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). In *Dombrowski* this Court expressly rejected a contention, such as adopted by the courts below, that vindication of

First Amendment rights could await the outcome of protracted state court proceedings, noting:

> ". . . [A] substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. . . .
>
> ". . . The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett* v. *Bullitt*, supra, at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . .' *NAACP* v. *Button*, 371 U.S. 415, 433. . . . [W]e have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. See *NAACP* v. *Button, supra*, at 432-433; cf. *Baggett* v. *Bullitt, supra*, at 378-379; *Bush* v. *Orleans School Board*, 194 F. Supp. 182, 185, affirmed *sub nom. Tugwell* v. *Bush*, 367 U.S. 907; *Gremillion* v. *United States*, 368 U.S. 11." (380 U.S. at 486-87).

Accord, *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 87 S. Ct. 708 (1967).

These transcendent constitutional principles were ignored by the courts below.

The courts below concluded that Dr. Stevens' federal action must be dismissed because (a) the anti-injunction statute, 28 U.S.C. § 2283, was an absolute bar to the relief petitioner sought, (b) he showed no "state action" and

hence petitioner failed to state a cognizable claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and implementing law, 28 U.S.C. 1343, (c) even assuming a cause of action under the Civil Rights Act of 1871, such was of no help to petitioner because that Act was not an expressly authorized exception to 28 U.S.C. § 2283, and (d) in any event, petitioner must await the outcome of the protracted state proceedings.

We respectfully submit that each of these four asserted bases for dismissal is pregnant with error. They are not supported by reason, logic, the decisions of this Court or the constitutional realities presented by this case. Each asserted reason enfolds pressing issues which should be resolved by this Court.

A.

The courts below held that 28 U.S.C. § 2283 was an insurmountable obstacle to the granting of any relief. This holding, we respectfully submit was in error and should be reviewed by this Court. If the courts below are correct, then no state court invasion of protected constitutional rights can be prevented at its inception, but only after the invasion has ripened into a final judgment, appealable to this Court.

We argued in the courts below that § 2283 is a codification of the judicial doctrine of comity which yields in cases of compelling constitutional necessity. Our argument was based upon decisions construing the statute itself and applying the judge-made rule of comity which we believed clearly indicated that the doctrine was one of equitable discretion and that the bar which comity erects to federal interference in state matters (be it a bar imposed by decision or by statute) must yield when necessary to give full protection against erosion of perishable constitu-

tional freedoms. See *Wells Fargo & Co.* v. *Taylor,* 254 U.S. 175 (1920); *Smith* v. *Apple,* 264 U.S. 274 (1924); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Baines* v. *City of Danville,* 337 F.2d 579 (4th Cir. 1964), *cert. denied,* 381 U.S. 939 (1965); *American Optometric Ass'n* v. *Ritholz,* 101 F.2d 883 (10th Cir.), *cert. denied,* 307 U.S. 647 (1939); *Browder* v. *Gayle,* 142 F. Supp. 707 (M.D. Ala.) (three judge court), *aff'd per curiam,* 352 U.S. 903 (1956).

As noted in *Browder,* the doctrine of abstention "has no application where the plaintiffs complain they are being deprived of constitutional civil rights. . . ." (142 F. Supp. at 713).

The Court of Appeals for Second Circuit, in affirming and in rejecting our argument, noted that: "We do not believe that Section 2283 is so limited." (Appendix B, p. 31, *infra*). This conclusion that 2283 is an absolute bar is in direct conflict with that reached by the Fourth Circuit in *Baines* v. *City of Danville, supra,* and appears to be an unwarranted and constitutionally injurious departure from the principles laid down by this Court in the cases cited above.

Moreover, the Second Circuit ruling in this case conflicts in principle with that of a different panel of judges drawn from the same Court made in *Wolff* v. *Selective Service Local Board No. 16,* No. 30783, 2d Cir., January 30, 1967. In *Wolff,* the plaintiffs had been reclassified from II-A to I-A because of their participation in demonstrations protesting American involvement in Viet Nam. They sued challenging the reclassification.

The Selective Service Board sought to dismiss for lack of a justiciable controversy because the plaintiffs had not demonstrated injury as they had not as yet been drafted or refused to report for an induction and hence subjected to criminal prosecution. The District Court granted the mo-

tion to dismiss but the Court of Appeals, relying on *Dombrowski,* reversed, noting:

> "Here it is not relevant whether or not appellants will ever be inducted. The effect of the reclassification itself is immediately to curtail the exercise of First Amendment rights, for there can be no doubt that the threat of receiving a I-A classification upon voicing dissent from our national policy has an immediate impact on the behavior of appellants and others similarly situated.
>
> "It has been held repeatedly that the mere threat of imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly and the right to vote. . . . Since it is the mere threat of unconstitutional sanctions which precipitates the injury, the courts must intervene at once to vindicate the threatened liberties." (Slip opinion at 1095-96)

The court in *Wolff* (noting this Court's decision in *Bond* v. *Floyd,* 385 U.S. 116 [1966]) clearly recognized its obligation "to intervene in areas normally left to other branches of government, when the free exercise of First Amendment guarantees is jeopardized." (*Wolff, supra,* slip opinion at 1098 n. 4).

This healthy exception to the rule of 2283—an exception required if paramount constitutional rights are to be protected—the courts below failed to recognize and apply. Their failure to do so presents a pressing reason for review; especially in light of this Court's opinion in *Dombrowski.*

B.

Both the District Court and the Court of Appeals held that Dr. Stevens had not stated a cognizable claim under the Civil Rights Act of 1871 because, in their opinion,

there was no "state action". Yet petitioner set forth a classical case of judicial and executive interference with constitutionally protected rights as defined by this Court in the landmark case of *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). See also, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 at 265 (1964).

Dr. Stevens was brought into court by service of process by a state official. The coercive power of the state compelled him to participate in proceedings in a state courthouse before a state judge. The power of the state—right down to confinement in the state jail-house for contempt—looms over him in every phase of the Pennsylvania litigation. It is inconceivable that "state action" is not present here. Yet, in a dangerous and precedent-breaking decision, the courts below so held.

By failing to recognize the claim of Dr. Stevens for relief under the Civil Rights Act, the courts below removed from the sphere of federal judicial protection an area of possible abuse of civil rights—that of abuse by unwarranted suits in state courts. Such an exemption was not, we respectfully submit, intended by the framers of the Civil Rights Act. Indeed, *Dombrowski* very clearly points the way to a contrary result.

C.

This case also brings into sharp focus the conflict between the circuits, and the issue twice left open by this Court, as to whether the Civil Rights Act is an "expressly authorized" exception to 28 U.S.C. § 2283. *Dombrowski* v. *Pfister*, 380 U.S. 479, 484 n. 2 (1965); *Cameron* v. *Johnson*, 381 U.S. 741 (1965). Compare, *Cooper* v. *Hutchinson*, 184 F. 2d 119 (3d Cir. 1950) and *Dilworth* v. *Reiner*, 343 F.2d 226 (5th Cir. 1965) with *Goss* v. *Illinois*, 312 F.2d

257 (7th Cir. 1963) and *Sexton* v. *Barry*, 233 F.2d 220 (6th Cir. 1956).

This issue, so critical to so many important litigations requires, and is now ripe for, resolution by this Court.

D.

Both courts below held that Dr. Stevens must await the outcome of the Pennsylvania litigation; that his rights could ultimately be vindicated by lengthy appeals through the Pennsylvania courts and, if necessary, to this Court. In so doing, the courts below failed to recognize the grave danger which the Pennsylvania action poses to free press and they failed to give effect to the guiding principles laid down by this Court in *Dombrowski, Button, Mills, Ashton,* among others, protecting the First Amendment from any activity which might have a "chilling effect" upon the free exercise of rights guaranteed by the Amendment.

This judicial abdication of responsibility in the guise of a wise exercise of the equitable doctrine of judicial abstention presents a compelling reason for review.

Conclusion

The Pennsylvania litigation has dragged on for more than two years. There were extensive pre-trial depositions, six days of trial and several oral arguments. Numerous briefs were submitted. The Pennsylvania action remains *sub judice* in the trial court. The petitioner is faced with the probability of several expensive and time-consuming appeals whatever the result in the Cumberland County Court of Common Pleas.

Since the ultimate and only relief sought in the state action is so clearly forbidden by the Constitution it follows that the state proceeding is but a charade. It is brought to harass and to punish Dr. Stevens; not with any real hope of success.

The mere pendency of the state action is a burden upon the free exercise of First Amendment rights; the suit must be defended, no matter how unmeritorious, and its existence inhibits distribution of Dr. Stevens' book. It creates a cloud over all historical writing.

The petition for a writ of certiorari should be granted.

April 5, 1967

Respectfully submitted,

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